U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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July 16, 2007

SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure

FROM: Water Resources and Environment Staff

SUBJECT: Hearing on Status of the Nation's Waters, including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act

PURPOSE OF HEARING

On Tuesday, July 17th and Thursday, July 19th, at 2:00 p.m., in Room 2167 Rayburn House Office Building, the Committee on Transportation and Infrastructure will receive testimony from the Governor of Montana, state officials, former Administrator of the Environmental Protection Agency (EPA) Carol Browner, legal scholars, scientists, and stakeholders on the status of the nation's waters, including wetlands, under the jurisdiction of the Federal Water Pollution Control Act.

BACKGROUND

This memorandum briefly summarizes the authorities of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," including wetlands. It also focuses on the ecological role of wetlands and intermittent and ephemeral streams. It will analyze three Supreme Court (the 'Court') decisions and legislative history concerning federal jurisdiction under the Clean Water Act.

Clean Water Act Introduction

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (hereafter referred to as the 'Clean Water Act' or the 'Act') to "restore and maintain the chemical, physical, and

biological integrity of the Nation's waters."[1] The 1972 Amendments dramatically changed the approach of the Federal Water Pollution Control Act, which can trace its roots back to the Water Quality Act of 1948.[2] Before 1972, the Federal Water Pollution Control Act had addressed water pollution by funding state and municipal water treatment systems and by requiring the establishment of state water quality standards. This approach had been largely ineffective in controlling individual discharges of pollution due to a lack of consistent state standards, and a limit on Federal authority to only interstate and coastal waters. The 1972 Amendments aimed to address this problem by instituting a national system requiring individual permits for discharges of pollutants to the nation's waters.

Section 301 of the Clean Water Act states:

> Except as in compliance with [specific provisions of] this Act, the discharge of any pollutant by any person shall be unlawful.[3]

In essence, the discharge of any pollutant, including dredge and fill material, is unlawful, except as specifically authorized by a permit. The Clean Water Act primarily uses permit programs under Section 402 (the National Pollutant Discharge Elimination System, or "NPDES," for point source pollution) and Section 404 (dredge and fill) to achieve the goals of the Act.

While the goals of the Clean Water Act speak to the restoration and maintenance of the "Nation's waters," both Section 402 and 404 refer to discharges into "navigable waters." This phrase is defined in Section 502(7) of the Clean Water Act, as follows:

> The term "navigable waters" means the waters of the United States, including the territorial seas.

While Section 502(7) is clear that "navigable waters" means 'the waters of the United States' considerable debate has nevertheless occurred concerning what 'navigable waters' consist of – and therefore, the potential jurisdictional scope of the Act. For example, recent court rulings have questioned whether the Clean Water Act applies to isolated water bodies and wetlands that lack a direct connection to traditional navigable waters.

The debate over the meaning of 'navigable waters' is important because the definition affects the authority of the Federal government to protect water quality in a number of areas, including the Clean Water Act's point-source NPDES permit (water pollution) program under Section 402, the Act's dredge-and-fill (wetlands protection) program under Section 404, as well as the Oil Pollution Act of 1990.[4]

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[1] 33 U.S.C. § 1251(a).
[2] *See* Water Quality Act, ch. 758, 62 Stat. 1155 (1948).
[3] 33 U.S.C. § 1311(a).
[4] 33 U.S.C. § 2701. The Oil Pollution Act has its origins in section §311 of the Clean Water Act, and accordingly, uses the same definition for "navigable waters" as contained in the Clean Water Act.

The Waters of the United States

As inferred by the definition of 'navigable waters' in the Clean Water Act, the jurisdictional scope of the Act includes a wider variety of waters, including wetlands, than 'traditionally navigable' waters.

The U.S. Army Corps of Engineers (the 'Corps'), which has primary authority over implementing the dredge-and-fill program under Section 404 of the Clean Water Act, has promulgated regulations over the years to include a wide range of waters in its regulatory definition of 'waters of the United States.' (*See below*) The most recent regulation defining 'waters of the United States' was promulgated in 1986. The EPA defines a similar range of waters as 'waters of the United States in a separate, regulatory definition.'[5]

Clean Water Act Jurisdictional Determinations

Prior to 2001 – the date of the *SWANCC* and *Rapanos* Supreme Court decisions cases discussed below – the Corps and EPA broadly interpreted the Clean Water Act's authority over waters, including wetlands.

For wetlands, the Corps relied mainly on current scientific knowledge that a wetland must have three characteristics – hydric soils,[6] hydrophytic vegetation,[7] and hydrology sufficient to cause the first two.

For other waters, the Corps and EPA interpreted questions of jurisdiction based upon the water's relation to interstate commerce, as defined in their implementation regulations. These regulations, found at 40 CFR 122.2 (EPA) and 33 CFR 328(a) (Corps), define the scope of the waters of the United States to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

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[5] 40 U.S.C. § 122.2 and § 232.2

[6] The Natural Resources Conservation Service defines 'hydric soils' as "soil that formed under conditions of saturation, flooding or ponding long enough during the growing season to develop anaerobic conditions in the upper part." (http://soils.usda.gov/use/hydric/intro.html (accessed 16 July, 2007))

[7] The Natural Resources Conservation Service defines 'hydrophytic vegetation' as "plant life growing in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content." (http://soils.usda.gov/use/hydric/criteria.html (accessed 16 July, 2007))

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

In 2001, the Supreme Court issued its ruling in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (discussed, in depth, later in this memo), that called into question Federal authority under the Clean Water Act to protect certain waters, including wetlands. In the discussion of this decision, the Court questioned whether the term "navigable," used in the Clean Water Act, implied a jurisdictional nexus between Federal authority and traditionally-navigable waters.

In the subsequent *Rapanos* decision, the Court attempted to create a legal test for determining Federal authority, based upon the Court's notion of an implied connection to navigable waters. Unfortunately, a majority of Justices could not agree on a single test to apply, but instead recommended several, distinct tests that would assert jurisdiction based on the ability of a waterbody to be used for navigation, or on a case-by-case "significant nexus" test that requires a "significant" connection between the waterbody and a traditionally navigable water.

Accordingly, these two Supreme Court decisions have substantially altered the analysis that had been used by the Corps and EPA for decades for asserting Federal jurisdiction over U.S. waters, including wetlands, by requiring a connection to traditionally-navigable waters that did not exist prior to 2001. As a result, certain waterbodies, including certain wetlands, are either no longer protected, or will have a high-burden to prove that they are protected, by the Federal Clean Water Act. For example, geographically isolated waters and related wetlands, may be excluded under this new analysis, despite the fact that such waters help protect local water quality, reduce regional flooding, and provide significant habitat for fish and wildlife.

Wetlands

Wetlands are transition areas between aquatic ecosystems and uplands (lands that are normally dry.) Wetlands are also characterized by periodic saturated or inundated soil conditions, as well as plants that can grow in saturated soil conditions.

Historically, wetlands were often destroyed because they were viewed as waste land, or as breeding grounds for disease. However, with increasing understandings of hydrology and ecology, wetlands are now viewed by many scientists and policy-makers as serving important ecological functions, and also having environmental and economic connections.

As waters flow across watersheds through wetlands, wetlands are able to filter or otherwise remove, through natural processes that assimilate pollution, particles and chemicals present in the waters that otherwise would contaminate surface waterways. When heavy rain falls and snowpack melts, wetlands store and slow the release of floodwaters, thereby reducing potential damage to communities and infrastructure downstream. Because wetlands slow and absorb waters moving either downstream or over land they can serve an erosion control function. Wetlands can also

recharge groundwater aquifers and sustain the yield of water for human use, as well as provide dry-season flows to rivers and streams.

Many plants and animals depend upon wetlands for habitat. In addition to providing commercial and recreational enterprises with jobs and income for thousands of communities in the United States, wetlands also help to maintain biodiversity. Three-quarters of the country's commercial fish and shellfish, which provide approximately $2 billion of revenue annually, are dependent upon coastal bays and their wetlands for some portion of their life-cycle.[8] Trees that grow in the forested swamps of the southeastern United States are harvested for timber. Ducks, geese, and other migratory birds in all flyways use wetlands for feeding, nesting, and resting during migration.

Because the role and function of wetlands was poorly understood in the past, more than one-half of the wetlands that were in existence throughout the coterminous United States at the time of European settlement no longer exist.[9] The distribution of wetland losses throughout the States is not uniform,[10] in some States and many watersheds, less than 10 percent of the original acreage still exists.[11]

In addition to their inherent value for flood protection and habitat, "[w]etlands are included as waters of the United States for the purposes of the Clean Water Act because it is recognized that some wetlands may improve water quality through nutrient cycling and sediment trapping and retention."[12] The goals of the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the nation's waters "cannot be achieved if wetlands are not protected."[13] This was recognized in the nation's "no net loss of wetlands" policy enacted by the first Bush administration,[14] and carried forth through subsequent administrations.

In recognition of these losses, as well as the importance of wetlands in achieving the goals of the Clean Water Act (*see below*), the U.S. Army Corps of Engineers (Corps) signed a Memorandum of Agreement with the U.S. Environmental Protection Agency (EPA) in 1990 outlining the position of the first Bush administration to "achieve a goal of no overall net loss of [wetland] values and functions." From that time on, both Republican and Democratic administrations have defended this goal of "no net loss" as a tool for implementing the broader goals of the Clean Water Act.

Although the rate of loss has dramatically decreased in recent years, the United States continues to lose thousands of acres of natural wetlands every year. Various types of economic activities result in some wetlands continuing to be drained, filled, and eliminated, despite the "no net

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[8] U.S. EPA and USDA. 1998. "Clean Water Action Plan." (February)

[9] Dahl, T.E. 1990. "Wetlands Losses in the United States 1780s to 1980s." U.S. Department of the Interior, Fish and Wildlife Service.

[10] Ten states have lost 70 percent or more of their wetland acreage, and 22 states have lost more than 50 percent. Only three states – Alaska, New Hampshire, and Hawaii – have lost less than 20 percent of their original wetlands. (Dahl, T.E. 1990. "Wetlands Losses in the United States 1780s to 1980s." U.S. Department of the Interior, Fish and Wildlife Service.)

[11] U.S. EPA and USDA. 1998. "Clean Water Action Plan." (February)

[12] National Research Council. 2001. *Compensating for Wetland Losses under the Clean Water Act.* National Academy Press. 11.

[13] National Research Council. 2001. *Compensating for Wetland Losses under the Clean Water Act.* National Academy Press. 11.

[14] Memorandum of Agreement between EPA and the Corps concerning the determination of mitigation under the CWA §404(b)(1) *Guidelines* (1990), Pt. II.C.

loss" policy.[15] Mitigation, such as through wetland restoration, enhancement, or creation, is typically required to compensate for wetlands losses.

Intermittent and Ephemeral Streams

All downstream lakes and rivers begin as headwater streams. These consist of small streams and wetlands whose waters flow above and below ground to ultimately join to create larger water bodies. These are often very small and may not appear on topographic maps. Disruption of these small water bodies may have a demonstrable impact on the larger water body downstream.

Among the various types of streams that comprise headwaters are intermittent and ephemeral streams. Intermittent streams are those that flow for several months a year. Ephemeral streams are those that flow at the surface only periodically, usually after a heavy rainstorm.

Intermittent and ephemeral streams provide several key ecological benefits. These streams play an important role in protecting water quality by filtering and processing pollutants when water is present. In addition, when water is present in them they recharge groundwater and supplement drinking water sources for much of the nation. By absorbing rainwater, runoff, and snowmelt, these streams provide natural flood control. They trap excess sediment, therefore keeping down water purification costs for users, as well as reducing the need for dredging downstream. When water is present in them, these streams provide habitat and encourage biological diversity, as some plants and animals are only found in such waters.

In terms of stream miles, intermittent and ephemeral streams comprise the majority of the nation's stream network. Accordingly, activities affecting these waters have a potentially significant impact on the overall water quality of the nation. The Corps and EPA, have, through their regulations, interpreted the Clean Water Act to include the protection of headwater streams. Both the Corps and EPA regulations[16] define 'streams' so as to include intermittent streams.

In addition, EPA reports that out of 43,507 total NPDES permits (e.g. point sources), nationwide, at least one-third (14,751 permits) are located on headwater streams.[17] EPA classifies headwaters streams in its analysis as including a variety of waters including intermittent, ephemeral, start reaches, and perennial streams.[18] Because these headwaters consists of a variety of stream types, point sources discharging into these waters may have to undergo 'significant nexus' tests to determine if they fall under the jurisdiction of the Clean Water Act. See Appendix for breakdowns

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[15] Dahl, T.E. 2006. "Status and Trends of Wetlands in the Coterminous United States, 1998 to 2004." U.S. Department of the Interior, Fish and Wildlife Service; *See also*, U.S. EPA. 2002. "National Water Quality Inventory: 2000 Report." (September)

[16] 33 CFR § 328.3 (a); [16] 40 CFR § 232.2

[17] Of all 43,507 total NPDES Individual permits, 85% have location data that allows EPA to determine whether they are located on headwater streams or not. As a result, over 14,751 NPDES Individual permits could be located on headwaters.

[18] "The [National Hydrography Dataset] characterizes stream reaches on flow characteristics such as perennial and intermittent/ephemeral, and "start reaches." We believe that the intermittent/ephemeral and "start" reach categories of water features provide the best available surrogate for providing a conservative estimate of the extent of "non-navigable" waters in the U.S. These categories are not mutually exclusive, i.e., a particular water can be both intermittent/ephemeral and a start reach. Start reaches may be navigable, but are not likely to be so. Similarly, the analysis assumes that intermittent-ephemeral waters are likely not navigable...In any event, "non-navigable" by itself is not determinative of jurisdiction." (EPA FOIA No. HQ-RIN-00684-07 (May 18, 2007))

by state. As many of these streams are intermittent, many would see limited or no flow during much of the year if it were not for the effluent flow discharged from the permitted point source.

Clean Water Act

Section 402 Program

The Clean Water Act permitting program is comprised of two major components – authority to address the discharge of pollutants from point sources through section 402, and authority to regulate the discharge of dredged or fill material through section 404.

The Clean Water Act imposes technology-based discharge control requirements on industrial and municipal dischargers through the 402 program. Industries must meet various standards based on the type of pollutant discharged and the type and age of the facility (*e.g.*, "best available technology economically achievable"). For municipalities, secondary treatment (defined in regulation as an 85 percent reduction in certain conventional pollutant concentrations as well as maintaining pH levels within a certain range) must be achieved. Additional limitations may also be imposed on dischargers through their NPDES permits where pollution levels in receiving waters continue to exceed water quality standards. This is accomplished through water quality based effluent limitations.

EPA is responsible for defining the required level of treatment for municipalities and for each type of industry to meet EPA's standards. EPA also must develop water quality criteria, specifying the maximum concentrations of pollutants permitted for different designated uses of waters.

These requirements are implemented and enforced through permits. Section 402 of the Act requires that all point source dischargers that discharge pollutants directly into jurisdictional waters must obtain a permit for that discharge either from EPA or a state, if the state has an EPA-approved permitting program. Currently, 45 states and the U.S. Virgin Islands have approved permitting programs. Permits are based on both technology requirements and water quality impacts, and set the concentration and amount of pollutants allowed to be discharged.

Permits issued under section 402, and under approved state programs, are required to be reviewed every 5 years. However, after two Supreme Court decisions (*SWANCC* and *Rapanos*), questions have been raised as to whether this periodic review will also require permitted entities to undergo jurisdictional determinations to determine whether the waterbody into which the discharge is released remains under the jurisdiction of the Clean Water Act.

Section 404 Program

The Section 404 program of the Clean Water Act regulates discharges of dredged or fill material into waters of the United States. Section 404 requires that permits be obtained in order that dredged or fill materials can be discharged into waters of the United States. The Corps and the EPA share responsibility for administering the Section 404 dredge-and-fill program.

The Corps' regulatory program utilizes both general permits (commonly referred to as 'nationwide' or 'regional' permits) for activities that are similar in nature and that will likely have a minor effect on wetlands, and individual permits for more significant activities. According to the Corps, it evaluates more than 100,000 permit requests annually. Of those, more than 90 percent are authorized under a general permit, which can apply regionally or nationwide, and is essentially a permit by rule, meaning the proposed activity is presumed to have a minor impact. Most do not require pre-notification or prior approval, and 87 percent of which are approved by the Corps in under 60 days.

About 10 percent (or about 10,000) are required to go through the more detailed evaluation for an individual permit. Of this number, roughly half are permits related to "letters of permission", or determinations by the Corps that the activity does not affect the traditional navigability of a waterbody (i.e., construction of a dock). The remaining 5,000 permits that must proceed under an individual permit process may involve complex proposals or sensitive environmental issues and can take 180 days or longer for a decision.

According to the Corps, nationwide, over 99 percent of permits are approved, although not always in the manner initially requested by the applicant. When permit applications are made, the Corps typically works with the applicant to modify the proposed action in a manner that will, to the maximum extent practicable, avoid or minimize losses to wetland values, and if such impacts cannot be avoided, require the applicant to carry out mitigation for lost values.

The Section 404 program consists of two distinct stages. Parties applying for a permit to place dredge or fill material into a water body must first undertake a jurisdictional determination. This process determines whether a water body, including wetlands, is within the jurisdiction of the Clean Water Act (and the federal government.) The second stage is a permitting stage, where an individual permit application is reviewed, and potential mitigation measures are outlined.

Similar to the 402 program, states can apply to assume Section 404 authority, but only two states have done so: Michigan and New Jersey. To assume Section 404 authority, states must have a wetlands discharge, dredge, and fill program that is at least as stringent as the federal program. Upon state assumption of the Section 404 program, the active federal program ceases.

Permit Exemptions

Under the Clean Water Act Amendments of 1977, a number of categorical activities are specifically exempted from the permitting requirements of the Act.

Under Section 402, permits are not required for discharges composed entirely of return flows from irrigated agriculture, or for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, or channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste product located on the site of such operation.

Under section 404, permits are not required for the following activities:

- Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
- Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures, such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches and transportation structures;
- Construction of temporary sedimentation basins on a construction side which does not include placement of fill material into navigable waters;
- Construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices;
- Any activity with respect to which a State has an approved program under Section 208(b)(4) of the Clean Water Act (related to area-wide management plans) and meets the requirements of subparagraphs (B) and (C) of such section [class or category of activities governed by Statewide regulation, and approved by the Administrator of EPA.

Certain activities are also exempted, by regulation, from the requirements of the Act. For example, activities undertaken on prior converted cropland are exempt.

U.S. Supreme Court Decisions Affecting Federal Jurisdiction

The United States Supreme Court has addressed the scope of Section 404 of the Clean Water Act on three occasions, in 1985, 2001, and 2006.

United States v. Riverside Bayview Homes, Inc. (1985)

In the first case, *United States v. Riverside Bayview Homes, Inc.*,[19] (*Riverside Bayview*) the Supreme Court unanimously upheld the Corps' jurisdiction over wetlands adjacent to navigable waters, and held that wetlands adjacent to navigable waters were "waters of the United States" within the meaning of the Clean Water Act.

Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (2001)

In January 2001, the United States Supreme Court issued a 5 to 4 opinion, in the case of *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*[20] (*SWANCC*), overturned the authority of the Corps of Engineers to regulate intra-state, isolated waters, including wetlands, based solely upon the presence of migratory birds (i.e., the Migratory Bird Rule.)

While the holding of the *SWANCC* case was very narrow, ruling that the Corps could not use the presence of migratory birds on an individual waterbody as the sole basis for Federal

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[19] 474 U.S. 121 (1985).

[20] *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001).

jurisdiction under the Clean Water Act, this decision marked the first time that the Supreme Court called into question Federal authority over U.S. waters under the Clean Water Act. In the discussion of the Court's opinion, Justice Rehnquist opined that when Congress used the term "navigable waters" in the Clean Water Act, Congress must have intended there to be some nexus to actual navigation.

In a footnote, the majority referenced the legislative history of the original Clean Water Act wherein Congress indicated that it "intend[ed] that the term 'navigable waters' be given the broadest possible constitutional interpretation," and then noted that Congress intended the phrase 'navigable waters' to include at least some waters that would not be deemed navigable under the classical understanding of that term.

Rapanos v. United States (2006) and *Carabell v. U.S. Army Corps of Engineers* (2006)

The third Supreme Court opinion involved the combined cases of *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*[21] (hereinafter collectively referred to as "*Rapanos.*")

In *Rapanos*, the court reached a 4-4-1 ruling on the issue of the jurisdiction of the Clean Water Act.

Justice Scalia issued the plurality ruling that was supported by three additional justices; however, because this opinion did not received a majority vote of the Court, it is not controlling in terms of legal precedent on the scope of the Clean Water Act. Justice Kennedy provided a fifth vote for remand,[22] but offered a separate opinion resting on what is referred to as the 'significant nexus' test.

In Justice Scalia's opinion, the limit of the jurisdictional reach of the Clean Water Act is to those waters that are relatively permanent, standing, or continuously flowing and that form geographic features.[23] While the Scalia opinion rejected the argument that "waters of the United States" are limited to only those waters that are navigable in the traditional sense and their abutting wetlands, it concludes that permanent, standing, or continuously flowing waters must be connected to traditional navigable waters. In Justice Scalia's view, intermittent or ephemeral waters would not be covered.[24] Under the Scalia rationale, for any wetlands to be covered under the Clean Water Act, they would have to be physically connected to these "permanent" waters.

The Scalia opinion reached the conclusion that regulating the discharge of dredged or fill material under Section 404 of the Clean Water Act constitutes an unauthorized intrusion into traditional state authority over land use regulation. In his opinion, he did not give traditional deference to the long-standing agency interpretation that "waters of the United States" can include

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[21] The Supreme Court granted *certiorari* in both *Rapanos v. United States*, No. 04-1034, and *Carabell v. Army Corps of Engineers*, No. 04-1384, and consolidated the cases for review. *Rapanos v. United States*, 126 S.Ct. 2208 (June 19, 2006).
[22] While a 4-4-1 decision, the *Rapanos* decision was 5-4 to vacate the lower court decisions and remand the case for further proceedings. In remanding the case back to the lower courts, the majority could only agree that the Sixth Circuit Court of Appeals did not exercise a sufficiently rigorous test to determine whether the waters were, in fact, subject to the Clean Water Act. *See* Jon Kusler and Pat Parenteau. 2006. "Discussion Paper: Rapanos v. United States, 'Significant Nexus' and Waters Subject to the Clean Water Act Jurisdiction." Association of State Wetland Managers.
[23] 126 S. Ct. 2221-2 (2006)
[24] 126 S. Ct. 2222 (2006)

areas that are not permanently inundated or directly connected to such permanent waters. Having reached that conclusion, he was highly critical of what he characterized as "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act – without any change in the governing statute – during the past five Presidential administrations."[25]

Justice Kennedy's opinion rejected the Scalia plurality's reasoning as "inconsistent with the [Clean Water] Act's text, structure, and purpose."[26] In his opinion, Justice Kennedy argues that a 'significant nexus' test be used to determine federal jurisdiction of waters. This test is wholly separate from the physical, continuous connection to permanent waters test of the Scalia plurality opinion. Recognizing the existence of the *SWANCC* jurisprudence in providing some meaning to the term "navigable," Justice Kennedy wrote:

> [The] Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." ...Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."[27]

The four dissenting justices, led by Justice Stevens, argued in support of maintaining the existing agency authority over waters and wetlands. The Bush administration argued this position in front of the Supreme Court in the *Rapanos* decision, and, on behalf of the United States, EPA and the Corps also submitted a brief in support of this position to the Court.

In summary, as a result of the *Rapanos* decision having no true majority opinion, no clear statement exists as to which jurisdictional approach should be implemented by EPA and the Corps.

Federal Guidance of the Corps and EPA on Implementation of the *Rapanos* Decision

On June 5, 2007, the Corps and EPA released guidance on implementing the *Rapanos* decision.[28] The guidance was developed as an attempt to ensure that jurisdictional determinations and administrative enforcement actions (regarding Clean Water Act violations) take into consideration the legal analysis of the *Rapanos* decision.

The guidance incorporates both the Scalia and Kennedy tests. Accordingly, individual permit applications under either section 402 or 404 must, on a case by case basis, undergo a jurisdictional determination, based on first, the Scalia test, and then, if necessary, the Kennedy 'significant nexus' test.

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[25] 126 S. Ct. 2215 (2006)
[26] 126 S. Ct. 2246 (2006)
[27] 126 S. Ct. 2248 (2006)
[28] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. 2007. "Clean Water Act Jurisdiction: Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States" (June 5, 2007)

According to the guidance, and the Scalia test, the Corps and EPA would likely determine that the Clean Water Act applies to traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries flow year-round or have continuous flow at least seasonally, or wetlands that directly abut such tributaries.

For all other waters, including wetlands, that fall outside of these categories, the guidance document would implement the Justice Kennedy 'significant nexus' test. This test is applied based on a fact-specific analysis to determine whether a significant nexus exists with a traditional navigable water for: non-navigable tributaries that are not relatively permanent; wetlands adjacent to non-navigable tributaries that are not relatively permanent; and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary. However, there is some uncertainty as to whether the same 'signficant nexus' test would apply to both sections 402 and 404 of the Act,[29] because there is a greater likelihood that traditional section 402 pollutants (e.g. toxics and sewage) have a greater impact on waters than traditional 404 pollutants (e.g. dredged or fill materials). Accordingly, a waterbody that may be jurisdictional under the *Rapanos* guidance 'significant nexus' test under section 402 would not be jurisdictional under such test for section 404.

In addition, according to the guidance, the EPA and the Corps must coordinate on jurisdictional determination decisions in a number of instances. These include: determinations for intra-state, non-navigable isolated waters potentially covered under 33 C.F.R. § 328.3(a)(3), where jurisdiction is asserted or not asserted based on interstate commerce factors; and determinations based on a finding of a "significant nexus."

Finally, the guidance document asserts that the agencies generally will not assert jurisdiction over swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow, or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

Legislative History and Interpreted Scope of the Term "Waters of the United States"

Legal scholars, stakeholders, regulators, and others vary in their opinions as to the scope of jurisdiction that Congress intended under the Clean Water Act. Some believe the legislative history of the term "waters of the United States" is not declarative as to Congress' intent. For example, as first proposed, neither the House nor the Senate versions of the Clean Water Act included the term "waters of the United States." Instead, each included the term "navigable waters," and each defined that term differently. The House bill defined "navigable waters" as "the navigable waters of the United States, including the territorial seas."[30] The Senate bill defined "navigable waters" as "the

[29] Justice Scalia, in his plurality opinion, dismissed concerns over the implication for regulating industrial discharges under section 402 of the Clean Water Act. He argued that even though the same definition of "navigable waters" might apply, the law prohibits "the addition of any pollutant to navigable waters." However, because this was not a majority decision, and only a plurality opinion, Justice Scalia's views are not controlling.

[30] H.R. 11896 (92nd Congress), § 502(8) (1972)

navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes."[31]

The final compromise eliminated "tributaries" from the Senate bill and "navigable" from the House bill, defining the "navigable waters" as simply "the waters of the United States." In explanation, the Conference Report adopted a portion of the language of the preceding House Report: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[32] This is the language that has traditionally been relied upon by many to support broad interpretations of Federal jurisdiction.

On one hand, the statement that the term "navigable waters" should be "given the broadest possible constitutional interpretation unencumbered by agency determinations" could be interpreted to mean that Congress intended to assert jurisdiction to the broadest extent of its constitutional commerce power, including over activities and/or waters that have a substantial effect on interstate commerce. For example, during consideration of the Conference report to accompany the 1972 Clean Water Act, Congressman John Dingell noted that:

> [The] the conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographic sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in other laws. The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability – derived from the *Daniel Ball* case (77 U.S. 557, 563)...[This] new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability...going to govern matters covered by this bill. Indeed, the conference report states on page 144: "The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation..." [33]

In addition, as recognized by Justice Rehnquist nearly three decades ago, "congressional authority over the waters of this Nation does not depend on a stream's "navigability" ... as demonstrated by this Court's decisions ... a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved."[34] In this decision, Justice Rehnquist quoted an earlier Supreme Court decision (*United States v. Appalachian Electric Power, Co.*) that stated:

> [I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . . [The] authority is as broad as

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[31] S. 2770 (92nd Congress), § 502(h) (1971)
[32] S. Rep. No. 92-1236, at 144 (1972)
[33] A Legislative History of the Water Pollution Control Act Amendments of 1972, January 1973, page 250.
[34] *Kaiser Aetna, et al., v. U.S.*, 444 U.S. 164, 173-74 (1979).

the needs of commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. 311 U.S. 377, 426 (1940).

On the other hand, the conferees' language could be interpreted, as others argue and the four Justices of the Supreme Court in it most recent cases read, to mean simply that Congress intended to override previous, unduly narrow judicial and agency interpretations to assert its broadest constitutional authority over traditional navigable waters.

In short, the legislative history of the 1972 Amendments to the Federal Water Pollution Control Act suggests that Congress did, indeed, intend to broaden significantly the reach of Federal regulatory authority over the nation's waters. However, what remains unresolved is how far that reach was broadened, and where the limits to Federal authority now exist.

The Committee is expecting to receive testimony from legal scholars, stakeholders, and government officials regarding their views on the scope of the nation's waters under the jurisdiction of the Federal Water Pollution Control Act.

APPENDIX

Permits issued under section 402 of the Clean Water Act, and under approved state programs, are required to be reviewed every 5 years. However, per the *Rapanos* guidance, periodic review may also be required for permitted entities to undergo jurisdictional determinations to determine whether the waterbody, into which the discharge is released, remains under the jurisdiction of the Clean Water Act. Some types of streams that are considered headwaters may not, as a result, be considered as falling under the jurisdiction of the federal government after conducting a 'significant nexus' test. EPA classifies headwaters streams in its analysis as including a variety of waters including intermittent, ephemeral, start reaches, and perennial streams.[35] As many of these streams are intermittent, many would see limited or no flow during much of the year if it were not for the effluent flow discharged from the permitted point source. Waters that are not considered under the jurisdiction of the Clean Water Act will not require Federal pollution control permits.

TABLE: Clean Water Act Point Source Pollution (NPDES) Permits Located on Headwater Streams by State[36][37] (Source: EPA Data and EPA Analysis of NPDES Data (2007))

STATE	Percentage of Current NPDES Permits with Location Data Located on Headwater Streams (%)	Number of NPDES Permits with Location Data Located on Headwater Streams
Alabama	47	566
Arizona	27	36
Arkansas	43	345
California	18	109
Colorado	22	66
Connecticut	9	12
Washington, D.C.	8	1
Delaware	31	17
Florida	25	104
Georgia	40	279
Hawaii	14	6
Idaho	14	15
Illinois	43	823
Iowa	42	513
Indiana	41	425
Kansas	18	10
Kentucky	50	910
Louisiana	34	393

[35] "The [National Hydrography Dataset] characterizes stream reaches on flow characteristics such as perennial and intermittent/ephemeral, and "start reaches." We believe that the intermittent/ephemeral and "start" reach categories of water features provide the best available surrogate for providing a conservative estimate of the extent of "non-navigable" waters in the U.S. These categories are not mutually exclusive, i.e., a particular water can be both intermittent/ephemeral and a start reach. Start reaches may be navigable, but are not likely to be so. Similarly, the analysis assumes that intermittent-ephemeral waters are likely not navigable...In any event, "non-navigable" by itself is not determinative of jurisdiction." (EPA FOIA No. HQ-RIN-00684-07 (May 18, 2007))

[36] Data from Alaska not included because there is incomplete mapping data in National Hydrography Dataset.

[37] Table refers to numbers and percentages of permits with location data, by state.

STATE	Percentage of Current NPDES Permits with Location Data Located on Headwater Streams (%)	Number of NPDES Permits with Location Data Located on Headwater Streams
Maine	22	25
Maryland	46	215
Massachusetts	19	62
Michigan	26	163
Minnesota	30	183
Mississippi	55	401
Missouri	55	1,470
Montana	16	9
Nebraska	30	154
Nevada	14	7
New Hampshire	34	32
New Jersey	34	234
New Mexico	30	36
New York	30	544
North Carolina	37	513
North Dakota	33	11
Ohio	45	1,243
Oklahoma	39	191
Oregon	22	74
Pennsylvania	44	1,876
Rhode Island	23	21
South Carolina	40	215
South Dakota	38	138
Tennessee	47	555
Texas	38	662
Utah	30	30
Vermont	25	20
Virginia	43	536
Washington	10	37
West Virginia	35	239
Wisconsin	31	212
Wyoming	28	13